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Democracy and Dissent: Reconsidering the Judicial Review of the Political Sphere

Yasmin Dawood*

Although there exists a lively debate as to whether dissenting opinions at the Supreme Court serve to enhance democratic legitimacy or undermine it, the specific issue of “dissenting about democracy” has received little attention. This article therefore focuses on the role of dissenting opinions when the topic before the Court is the democratic system itself. In its law of democracy decisions,¹ the Court has addressed

* Assistant Professor, Faculty of Law, University of Toronto. I am grateful to Benjamin Berger, Jamie Cameron, Sonia Lawrence, Carissima Mathen, and anonymous reviewers for very helpful comments and conversations. My thanks as well to Sarah McLeod and Tamar Meshel for excellent research assistance.

¹ *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158 (S.C.C.) [hereinafter “*Saskatchewan Reference*”] (electoral boundary drawing); *Sauvé v. Canada (Attorney General)*, [1993] S.C.J. No. 59, [1993] 2 S.C.R. 438 (S.C.C.) [hereinafter “*Sauvé I*”] (inmate voting rights); *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.) [hereinafter “*Haig*”] (residency requirements during referenda); *Harvey v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 82, [1996] 2 S.C.R. 876 (S.C.C.) [hereinafter “*Harvey*”] (membership in provincial legislatures); *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.) [hereinafter “*Libman*”] (referendum spending limits); *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.) [hereinafter “*Thomson Newspapers*”] (public opinion polls); *Sauvé v. Canada (Attorney General)*, [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.) [hereinafter “*Sauvé II*”] (inmate voting rights); *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, [2003] 1 S.C.R. 912 (S.C.C.) [hereinafter “*Figueroa*”] (benefits for political parties); *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.) [hereinafter “*Harper*”] (third party election spending); *R. v. Bryan*, [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527 (S.C.C.) [hereinafter “*Bryan*”] (distribution of election results); *Opitz v. Wrzesnewskiy*, [2012] S.C.J. No. 55, [2012] 3 S.C.R. 76 (S.C.C.) [hereinafter “*Opitz*”] (contested elections and the entitlement to vote).

various aspects of the democratic system, including electoral redistricting, campaign finance, referenda and opinion polls.²

It is striking that the Court's law of democracy cases have a much higher rate of dissent (approximately 65 per cent) as compared to the average rate (approximately 35 per cent).³ Consider, for instance, the Court's recent decision in *Opitz v. Wrzesnewskyj*, a case which concerned a contested election in the Etobicoke Centre Riding.⁴ The Court was sharply divided. In a 4-3 decision, the majority and dissenting opinions laid forth divergent approaches as to how courts should determine the entitlement to vote.⁵ The *Opitz* decision is yet another law of democracy case in which there is considerable disagreement among the justices.

This article examines the phenomenon of "dissenting about democracy", and in particular, it seeks to understand why there is so little consensus on the Supreme Court with respect to its law of democracy cases. My central claim is that the high rate of dissent is driven in part by a fundamental disagreement about the nature of democracy itself. While the Court's law of democracy cases are concerned with differing legal issues, there is an underlying problem that unites them. Specifically, I argue that these cases present the following conceptual puzzle: is the electoral system best conceived as a constitutional entity or a political entity? On the one hand, the democratic process is a product of a wide array of constitutional provisions, rights and rules. On the other hand, the democratic process is the quintessential site of politics.

I refer to this puzzle as the "framework/politics" problem. The puzzle underlying many cases is whether the electoral process is better seen as belonging to the overarching constitutional framework, or whether it is better viewed as belonging to the political activity that takes place within this framework. I argue that the framework/politics problem lies at the heart of the divide between the majority and the dissenting justices in many of the Court's law of democracy cases. These cases often turn on

² The Court's law of democracy cases have arisen under s. 3 (the right to vote), s. 2(b) and 2(d) (freedoms of expression and association), and s. 15 (equality guarantee) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"]. Colin Feasby, "Constitutional Questions About Canada's New Political Finance Regime" (2007) 45 Osgoode Hall L.J. 514, at 539 (defining the law of the political process as encompassing decisions that fall under ss. 3, 2 and 15).

³ See Part II.1.

⁴ *Opitz*, *supra*, note 1.

⁵ See discussion of *Opitz* in Part II.2.

divergent approaches to the issue of judicial deference.⁶ Those justices who characterize the electoral process as “political” tend to defer to the legislature with respect to electoral laws. By contrast, those justices that conceive of the electoral system as part of the constitutional framework tend to subject the electoral law to greater scrutiny. Thus, the divide on the Court is often rooted in a fundamental disagreement about the proper characterization of the electoral process.

This article examines the framework/politics problem, and shows how it arises in a wide array of the Court’s law of democracy cases. Even though these cases are concerned with different legal issues, they are united by the fundamental question of whether the Court should treat the electoral process as primarily belonging to the political sphere or the constitutional framework. In recent cases, a majority of the Court has tended to treat the electoral process as “political”, and for this reason, it has deferred to the legislature when evaluating the constitutionality of electoral laws. I argue, however, that the electoral process is better conceived of as a dual constitutional-political entity. The main implication of this observation is that the Court should not automatically defer to the legislature on the grounds that the electoral process is political. I claim that the Court’s role is to protect the fairness and legitimacy of the democratic process,⁷ and this means that it must subject the political aspects of the electoral process to constitutional limits. Instead of deferring to the legislature on the basis that the electoral system is political, the Court should subject electoral laws to greater scrutiny to ensure that these laws do not undermine constitutionally protected rights.

This article proceeds in three sections. Part I examines two main approaches to dissenting opinions and democracy: the legitimacy-detracting view and the legitimacy-enhancing view, respectively. Part I also provides a comparative analysis of the rates of dissent at the Supreme Court of Canada and the U.S. Supreme Court, respectively. Part II begins with a quantitative analysis of the rate of dissenting opinions in the Supreme Court of Canada’s law of democracy cases. It then engages in a discussion of the Court’s most

⁶ Yasmin Dawood, “Democracy and Deference: The Role of Social Science Evidence in Election Law Cases” (forthcoming Nat. J. Const. L. 2013) [hereinafter “Dawood, ‘Democracy and Deference’”].

⁷ Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62 U.T.L.J. 499, at 504-505 [hereinafter “Dawood, ‘Electoral Fairness’”].

recent election law case, *Opitz v. Wrzesnewskyj*. Part III turns to a consideration of the “framework/politics” puzzle, and shows how it manifests in various decisions. In addition, it considers how the Court should address the duality of the electoral system. This Part argues that the Court’s role is to secure the fairness and legitimacy of the democratic process, and for this reason the Court must ensure that the political aspects of the electoral system are subject to constitutional limits.

I. DISSENTING OPINIONS: THEORY AND TRENDS

There are two main conceptual approaches to the role and function of dissenting opinions, which can be labelled the *legitimacy-detracting view* and the *legitimacy-enhancing view*, respectively. Some people argue that dissents detract from the legitimacy and authority of law. Chief Justice Roberts of the U.S. Supreme Court, for example, views dissents as a “symptom of dysfunction” that weakens the authority of the court because internal divisions are revealed.⁸ The legitimacy-detracting view can be further subdivided into the institutional approach and the interpretive approach.⁹ The institutional approach is based on the idea that institutions must speak with a single voice in order to uphold the rule of law.¹⁰ That is, the Court’s public statements should not be the statements of individual justices. Dissenting opinions disrupt the institutional approach because the opinions are attached to specific justices rather than to the Court as a public institution. The interpretive approach is based upon a conception of objectivity and compliance with the rule of law.¹¹ That is, the law produces determinate and objective outcomes. Dissenting opinions disrupt the interpretive approach because they suggest that there is no one legal resolution to a given problem.

According to the legitimacy-enhancing view, dissenting opinions play a crucial role in protecting and furthering rule of law values. Justice Brennan of the U.S. Supreme Court argues, for instance, that “the right to dissent is one of the great and cherished freedoms” in a democratic

⁸ Todd M. Henderson, “From Seriatim to Consensus and Back Again: A Theory of Dissent” (2007) 2007 Sup. Ct. Rev. 283, at 283 [hereinafter “Henderson”].

⁹ Kevin M. Stack, “The Practice of Dissent in the Supreme Court” (1995) 105 Yale L.J. 2235, at 2237 [hereinafter “Stack”].

¹⁰ *Id.*

¹¹ *Id.*

system.¹² One purpose of dissents is to point out the flaws in the majority's reasoning. Dissents are thus "offered as a corrective in the hope that the Court will mend the error of its ways in a later case".¹³ In a similar vein, Ginsburg J. observes that dissents serve to strengthen the majority opinion because the majority justices have to respond to the concerns of the dissenting justices.¹⁴ Judge Diane Wood likewise argues that dissents hold the majority accountable.¹⁵ Another advantage to dissents is that they provide practical guidance to future litigants about how to distinguish subsequent cases.¹⁶ Dissents also add to the marketplace of ideas.¹⁷

Some commentators argue that dissents enhance democratic legitimacy because they are an instance of reasoned discourse.¹⁸ Kevin Stack contends, for example, that dissents can be justified under the theory of deliberative democracy.¹⁹ He argues that the U.S. Supreme Court's political legitimacy "depends in part upon the Court reaching its judgments through a deliberative process".²⁰ While a unanimous opinion provides reasons, the presence of a dissenting opinion demonstrates reasoned dialogue or the exchange of reasons.²¹ The practice of dissent promotes deliberation and is thus in keeping with democratic principles.²²

There are well-known dissents that have shaped the evolution of the law and made it better over time.²³ Dissents are at times vindicated when the Supreme Court changes its course, when the Constitution is amended,

¹² William J. Brennan, Jr., "In Defense of Dissents" (1985) 37 Hastings L.J. 427, at 438 [hereinafter "Brennan"].

¹³ *Id.*, at 430.

¹⁴ Ruth Bader Ginsburg, "Remarks on Writing Separately" (1990) 65 Wash. L. Rev. 133, at 139.

¹⁵ Diane P. Wood, "When to Hold, When to Fold, and When to Reshuffle: The Art of Decision Making on a Multi-Member Court" (2012) 100 Cal. L. Rev. 1445, at 1445 [hereinafter "Wood"].

¹⁶ Brennan, *supra*, note 12, at 430.

¹⁷ *Id.*, at 435.

¹⁸ Note, "From Consensus to Collegiality: The Origins of the 'Respectful' Dissent" (2011) 124 Harv. L. Rev. 1305, at 1315-16; Peter Bozzo, Shimmy Edwards & April A. Christine, "Many Voices, One Court: The Origin and Role of Dissent in the Supreme Court" (2011) 36 J. Sup. Ct. Hist. 193, at 194.

¹⁹ Stack, *supra*, note 9, at 2236.

²⁰ *Id.*

²¹ *Id.*, at 2257.

²² *Id.*, at 2246.

²³ Henderson, *supra*, note 8, at 329, 335. The examples of law-changing dissents that are routinely referred to in the United States include Justice Curtis' dissent in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), Harlan J.'s dissent in *Plessy v. Ferguson*, 163 U.S. 532 (1896), and Holmes J.'s dissents in *Lochner v. New York*, 198 U.S. 95 (1905) and *Abrams v. United States*, 250 U.S. 616 (1919).

or when legislation is enacted.²⁴ It should be noted, however, that there are different approaches to opinion writing in different jurisdictions. At one end of the spectrum is the practice in England where opinions are issued in seriatim.²⁵ Courts in civil law countries, which issue only one decision, are at the other end of the spectrum.²⁶ Courts in Canada and the United States tend to take a middle path between issuing a single opinion and issuing seriatim opinions.²⁷ Yet even within this middle path, some chief justices are known for discouraging dissents. At the beginning of her tenure, McLachlin C.J.C. stated that one of her main objectives was to increase consensus on the Court.²⁸ Chief Justice Marshall of the U.S. Supreme Court was known for insisting on one opinion for the Court.²⁹

With respect to patterns of dissent at the U.S. Supreme Court, there are dissenting opinions in more than half of the cases between 1941 and 1997.³⁰ Another study finds that the U.S. Supreme Court rendered unanimous judgments in about 40 per cent of its cases between 1990 and 2000.³¹ For the same period, the Supreme Court of Canada displayed a greater norm of consensus with about 60 per cent of cases leading to unanimous decisions.³² Another study found that the Supreme Court of Canada obtained unanimity in over 63 per cent of its cases from 1975 to 2005 in contrast to the U.S. Supreme Court which contained a unanimity rate of 28.4 per cent.³³

Chief Justice McLachlin's unanimity rate from 2000 to 2009 was approximately 63 per cent (as compared to 58.4 per cent under Lamer C.J.C. from 1990-2000 and 64.7 per cent under Dickson C.J.C. from 1984-1990).³⁴ The increase in unanimity under McLachlin C.J.C. is greater than the raw statistics would suggest because she has a far higher rate of assigning panels of nine than her predecessors. Chief Justice McLachlin

²⁴ Wood, *supra*, note 15, at 1458.

²⁵ *Id.*, at 1449.

²⁶ *Id.*, at 1448.

²⁷ *Id.*, at 1450.

²⁸ Emmett Macfarlane, "Consensus and Unanimity at the Supreme Court of Canada" (2010) 52 S.C.L.R. (2d) 379, at 384 [hereinafter "Macfarlane"].

²⁹ Wood, *supra*, note 15, at 1450.

³⁰ Henderson, *supra*, note 8, at 333.

³¹ Benjamin Alarie & Andrew Green, "Charter Decisions in the McLachlin Era: Consensus and Ideology at the Supreme Court of Canada (2009) 47 S.C.L.R. (2d) 475, at 476, 486 [hereinafter "Alarie & Green"].

³² *Id.*, at 476, 486.

³³ Macfarlane, *supra*, note 28, at 380.

³⁴ *Id.*, at 385.

assigned panels of nine in 52 per cent of cases, Lamer C.J.C. in 30 per cent, and Dickson C.J.C. in 10 per cent.³⁵ Chief Justice McLachlin has also tried to consolidate disagreement so that there are fewer concurrences.³⁶

In the post-Charter period, the Supreme Court of Canada has been relatively cooperative.³⁷ The reasons for this difference between the United States and Canada could be the fact that the appointments process is less partisan and politicized.³⁸ Another possible reason is that legal culture is more deferential to the tradition of parliamentary sovereignty.³⁹ In addition, Benjamin Alarie and Andrew Green have found that the justices of the Supreme Court of Canada are not as overtly ideological in their voting patterns as the justices of the U.S. Supreme Court.⁴⁰

II. DISSENTING ABOUT DEMOCRACY

1. Dissents and the Law of Democracy

It is striking to observe that despite the general trend toward consensus at the Supreme Court, the law of democracy cases involve a great deal of dissenting. Although the sample size is too small to draw any firm conclusions, it is worth tabulating the rate of dissent (please see Table 1 below for the breakdown).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Alarie & Green, *supra*, note 31, at 486.

³⁸ Macfarlane, *supra*, note 28, at 380.

³⁹ *Id.*

⁴⁰ Alarie & Green, *supra*, note 31, at 475.

Table 1: Law of Democracy Cases

Case	Unanimous in Result	Unanimous in Reasons	Holding Breakdown	Majority Opinion	Concurrences	Dissenting Opinion
<i>Saskatchewan Reference</i>			6-3	5	1	3
<i>Sauvé I</i>	X	X	9-0	9	0	0
<i>Haig</i>			7-2	5	1+1+2	2
<i>Harvey</i>	X		9-0	6	1+2	0
<i>Libman</i>	X	X	9-0	9		
<i>Thompson Newspapers</i>			5-3	5	0	3
<i>Sauvé II</i>			5-4	5	0	4
<i>Figueroa</i>	X		9-0	6	3	0
<i>Harper</i>			6-3	6	0	3
<i>Bryan</i>			5-4	1+1+3	0	4
<i>Opitz</i>			4-3	4	0	3

Out of 11 total cases, only four (or 36 per cent) are unanimous with respect to the result and only two (or 18 per cent) are unanimous with respect to the reasoning. Seven cases (or 64 per cent) have dissenting opinions, while the remaining four (or 36 per cent) are composed of majority and concurring opinions. Of the four cases that do not have any dissents, one case (*Sauvé I*) consists of a brief paragraph, one case (*Harvey*) has two concurring opinions, and one case (*Figueroa*) has one concurring opinion. Thus, there is only one case out of 11 (*Libman*) in which the Court has issued a fully reasoned decision to which all nine justices have given their assent. The rates of concurrence are also worth noting: five out of 11 (or 45 per cent) of the Court's law of democracy cases have concurring opinions. The status of concurring opinions is somewhat ambiguous because at times concurring opinions closely track the reasoning of the majority but at other times they depart significantly from the majority's reasoning. Even if we leave aside the concurring opinions, these data show a great deal of dissenting about democracy. It is notable that there is a significant amount of dissent even though there have been changes to the membership of the Court since 1991.

2. The *Opitz* Case

The trend of dissenting about democracy was also evident in the Supreme Court's most recent law of democracy decision. The *Opitz* case concerned the entitlement to vote and how this entitlement is determined. The case arose out of a contested election result in the May 2011 federal election.⁴¹ In the Etobicoke Centre riding 52,794 votes were cast. Conservative MP Ted Opitz won the riding by a narrow 26 votes against Liberal incumbent Boris Wrzesnewskyj. The case concerned the entitlement to vote and how this entitlement is determined. In May 2012, Ontario Superior Court Justice Thomas Lederer set aside Opitz's win on the basis that 79 ballots had procedural irregularities.⁴² There was no evidence of fraud or corruption.

In a 4-3 decision, the Supreme Court overturned the lower court, thus averting a new election. The Court held that 59 of the 79 votes set aside

⁴¹ For a discussion of the issues, see Andrew Geddis, "Resolving Disputed Elections in Canada and New Zealand", paper presented at the 2012 Constitutional Roundtable, Faculty of Law, University of Toronto (unpublished manuscript).

⁴² [2012] O.J. No. 2308, 110 O.R. (3d) 350 (Ont. S.C.J.).

by the Ontario Superior Court should be reinstated. Mr. Opitz won with a six-vote margin. In a majority decision by Rothstein and Moldaver JJ. (joined by Deschamps and Abella JJ.), the Court refused to “disqualify the votes of several Canadian citizens based on administrative mistakes, notwithstanding evidence that those citizens were in fact entitled to vote”.⁴³ The majority stated that disenfranchising entitled voters would undermine public confidence in the electoral process.⁴⁴ The Court was also concerned that if annulments of elections were easy to do, the “finality and legitimacy of election results will be eroded”.⁴⁵ For this reason, “[o]nly irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election”.⁴⁶

The case involved section 3 of the Charter, which protects the right to vote, and section 6 of the *Canada Elections Act*⁴⁷ which sets out requirements for how citizens are to satisfy election officials that they are entitled to vote. Section 524(1) of the *Canada Elections Act* provides that elections can be contested on the grounds that there were “irregularities, fraud or corrupt or illegal practices that affected the result of the election”. Section 531(2) provides that if these grounds are established a court may annul the election.⁴⁸ The Court majority also outlined the administrative procedures by which entitlement to vote has to be ascertained.⁴⁹ According to the majority, the procedural safeguards while important, should not be treated as “ends in themselves”; such procedures are only a means for ensuring that those who are entitled to vote do so.⁵⁰ Ambiguities in statutory language should be “interpreted in a way that is enfranchising”.⁵¹ At the same time, the procedures in the Act are necessary to safeguard the public’s faith that elections are fair.⁵² The Court majority acknowledged that the electoral system “must balance several interrelated and sometimes conflicting values ... include[ing] certainty, accuracy, fairness, accessibility, voter

⁴³ *Opitz*, *supra*, note 1, at para. 1.

⁴⁴ *Id.*

⁴⁵ *Id.*, at para. 2.

⁴⁶ *Id.*

⁴⁷ S.C. 2000, c. 9.

⁴⁸ *Opitz*, *supra*, note 1, at para. 20.

⁴⁹ *Id.*, at paras. 13-18.

⁵⁰ *Id.*, at para. 43.

⁵¹ *Id.*, at para. 37.

⁵² *Id.*, at para. 38.

anonymity, promptness, finality, legitimacy, efficiency and cost” and most importantly of all — the right to vote.⁵³

There are two approaches, developed by the lower courts, for determining the validity of an election. The first is a strict procedural approach under which a vote is deemed to be invalid in the event an election official fails to follow any one of the procedures used to establish the entitlement to vote.⁵⁴ The second is a substantive approach, under which the failure to abide by a single requirement is not fatal. The substantive approach invalidates only those votes that were cast by citizens not entitled to vote.⁵⁵

The majority adopted the substantive approach because “it focuses on the underlying right to vote, not merely on the procedures used to facilitate and protect that right”.⁵⁶ There are two steps under this approach. First, the appellant must establish an irregularity, which is defined as a breach of a statutory provision. Second, an appellant must establish that someone not entitled to vote actually voted. That is, the irregularity must be shown to have “affected the result”. According to the majority, it is permissible to rely on after-the-fact evidence of entitlement to vote.⁵⁷ If both these requirements have been satisfied, the court then applies the “magic number” test. Under the magic number test, the election is annulled if the number of invalid votes is equal to or greater than the number of votes by which the successful candidate won.⁵⁸

Having established these standards, the majority went through the contested ballots in great detail and found that 59 of the 79 votes should be restored.⁵⁹ Because the remaining 20 votes were less than Mr. Opitz’s plurality of 26 votes, the Court upheld the election. The Court did not defer to the findings of the application judge on the basis that he had made two errors of law.⁶⁰ Without delving into all the details of each contested ballot, it is worth noting that some of the mistakes made by election officials did not, according to the majority, arise to the level of

⁵³ *Id.*, at para. 44.

⁵⁴ *Id.*, at para. 54.

⁵⁵ *Id.*, at para. 55.

⁵⁶ *Id.*, at para. 57.

⁵⁷ *Id.*, at para. 61.

⁵⁸ *Id.*, at para. 73.

⁵⁹ *Id.*, at para. 78.

⁶⁰ *Id.*, at paras. 80-81. According to the majority, the application judge reversed the onus of proof with respect to two polls, and failed to consider material evidence with respect to two other polls. *Id.* The dissenting justices disagreed with this assessment, finding that the application judge did in fact place the onus on the right party. *Id.*, at para. 174.

an “irregularity”.⁶¹ The majority appeared to draw a distinction between “irregularities”, which are “serious administrative errors that are capable of undermining the electoral process” and mere mistakes.⁶² For instance, the majority stated that “incorrect record-keeping of vouching, on its own, cannot amount to an “irregularity”.⁶³

The dissenting opinion was authored by McLachlin C.J.C. (joined by LeBel and Fish JJ.). The dissent agreed with the majority that the “overarching purpose of the Act is to ensure the democratic legitimacy of federal elections in Canada”.⁶⁴ The dissent identified the principle of entitlement to vote as the “central pillar” of the electoral system. The formal entitlement process is the mechanism by which the electoral system strikes a balance between two goals: “enabling those who have the constitutional right to vote to do so, and ensuring that those who do not have that right are not allowed to vote”.⁶⁵

It is worth noting, however, that the dissenting justices had a different understanding of the interaction between the Charter-protected right to vote in section 3 and the provisions of the *Canada Elections Act*. According to the dissent, the Act sets out a comprehensive scheme composed of three requirements: (1) qualification by citizenship and age — as set forth in section 3 of the Charter; (2) registration — established by the list electors or by filing a registration certificate; and (3) identification — established by identification or by taking an oath and being vouched for by another elector.⁶⁶

According to the dissent, “qualification” to vote is necessary but not sufficient for “entitlement” to vote.⁶⁷ A voter must also satisfy the registration and identification requirements to be entitled to vote because these requirements are crucial for protecting the integrity of the electoral system.⁶⁸ Chief Justice McLachlin argued that the justices in the majority wrongly “merge[d] the concepts of qualification and entitlement” because they held that “everyone who is qualified to vote and ordinarily resident in the electoral district is entitled to vote”.⁶⁹ It would appear, then, that the majority

⁶¹ *Id.*, at paras. 90, 93, 100, 107.

⁶² *Id.*, at para. 24.

⁶³ *Id.*, at para. 108.

⁶⁴ *Id.*, at para. 145.

⁶⁵ *Id.*, at para. 151.

⁶⁶ *Id.*, at para. 139.

⁶⁷ *Id.*, at para. 140.

⁶⁸ *Id.*

⁶⁹ *Id.*, at para. 164.

gave priority to the Charter-protected right to vote, while the statutory provisions of the *Canada Elections Act* were viewed as only providing the means for ascertaining the Charter right. By contrast, the dissenting justices viewed the Charter right on par with the statutory provisions, treating all the requirements (qualification, registration and identification) as being equally necessary to establish the entitlement to vote.

The dissent also said that the Court should not disturb the findings of the application judge unless there was “palpable and overriding error”. Although the judge erred with respect to some votes, there were still 65 ballots cast by persons who were not entitled to vote.⁷⁰ For this reason, the dissenting justices concluded that the election should be annulled. In addition, the dissent rejected the view that a voter can establish entitlement later.⁷¹ Allowing voters to establish entitlement post hoc would mean that the accuracy of the election outcome can only be confirmed by investigating the voters’ qualifications after the election. Such a process would be unfair to those voters who were turned away from the polls because they had not followed the necessary steps.⁷²

The *Opitz* decision will provide guidance to future courts about how deeply to involve themselves in election disputes. A majority of four justices held that courts should not overturn elections without evidence of serious errors that have affected the election outcome. Mere administrative mistakes are not sufficient. Allowing the election to be annulled may have sparked further litigation in the future. Both the majority and dissenting justices agreed that the public’s confidence in the electoral process is the central value at stake in the case. For the majority, an annulment would have shaken Canadians’ confidence in the electoral process, while for the dissent, an annulment would have strengthened the public’s confidence in the electoral process because it would signal that elections would not stand in the face of irregularities.

III. THE ELECTORAL SYSTEM: CONSTITUTIONAL OR POLITICAL?

The *Opitz* decision is the latest in a line of Supreme Court decisions in which there is a notable lack of consensus about the judicial review of the democratic process. In the Court’s law of democracy decisions, the

⁷⁰ *Id.*, at para. 142.

⁷¹ *Id.*, at para. 166. The Act does not provide for this possibility. *Id.*, at para. 213.

⁷² *Id.*, at para. 167.

divide between the majority and dissenting justices often turns on divergent approaches to the issue of judicial deference.⁷³ Those justices who defer to the legislature tend to hold that the legislative provision at issue is justified under section 1, while those justices who do not defer to the legislature tend to find that the provision is not justified under section 1. In this section, I argue that the debate over deference is rooted in a deeper issue, namely, the proper characterization of the electoral system. Is the electoral system best conceived of as a part of the constitutional framework or as part of the political sphere? The following discussion in the *Secession Reference* decision is helpful for understanding the puzzle raised by the electoral system:

The role of the Court in this *Reference* is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations.⁷⁴

The Court states that it has the authority to interpret issues relating to the “constitutional framework within which political decisions may ultimately be made”.⁷⁵ The “workings of the political process” that take place within this framework, however, must be resolved through political judgments, not judicial ones.⁷⁶

I claim that the Court’s approach in the *Secession Reference* as described above sheds useful light on the issue at stake in the law of democracy cases. In particular, I argue that the electoral system is best conceived as comprising both constitutional aspects and political aspects.⁷⁷ On the one hand, the Constitution creates the governmental

⁷³ Dawood, “Democracy and Deference”, *supra*, note 6.

⁷⁴ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 100 (S.C.C.) [hereinafter “*Secession Reference*”].

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Constitutional conventions also arguably have both political and constitutional aspects. Constitutional conventions are unwritten rules that “have developed from government practice over time and that are enforced not by the courts but by political sanction”. Patrick Macklem & Carol Rogerson, *Canadian Constitutional Law*, 4th ed. (Toronto: Emond Montgomery, 2010), at 5. The principle of responsible government is an example of a constitutional convention. The Supreme Court has considered the status of constitutional conventions in various cases including the *Patriation Reference*. See *Reference re Amendment of Constitution of Canada*, [1981] S.C.J. No. 58,

structures that form the democratic system. Charter provisions protect democratic rights such as the right to vote and the right to freedom of expression. On the other hand, the democratic process is the site of politics. Many aspects of the democratic system are determined through the legislative process. For example, Parliament sets out the rules for elections in the *Canada Elections Act*.

Some conflicts arise on the Court because there are divergent understandings as to whether the particular issue before the Court falls under the “constitutional framework” part of the electoral system or the “politics” part of the electoral system.⁷⁸ In most cases, there is a direct conflict between the constitutional and political aspects of the democratic process. In general, I argue that the Court should recognize the dual political-constitutional character of the democratic process. The direct implication is that the Court should not reflexively defer to the legislature on the basis that the electoral process is political and hence not a subject for judicial intervention. The next section examines some of the Court’s cases in more detail to illustrate the challenges presented by the “framework/politics” problem.

1. Competing Views of the Court’s Role in the Political Thicket: *Saskatchewan Reference*

The framework/politics problem was evident in the Supreme Court’s first law of democracy decision. In *Saskatchewan Reference*, the Court considered whether Saskatchewan’s electoral boundaries violated the right to vote as protected by section 3 of the Charter.⁷⁹ The case arose because the governing Progressive Conservative party passed the *Electoral Boundaries Commission Act* (“EBCA”), which imposed various restrictions on the independent boundary commission that was charged with redrawing Saskatchewan’s electoral map.⁸⁰ The EBCA required that the urban and rural ridings had to adhere to a strict quota, and that the urban ridings had to coincide with municipal boundaries. In addition to imposing these two conditions, the legislation also allowed variances in the population sizes of

[1981] 1 S.C.R. 753 (S.C.C.). For a discussion of the *Patriation Reference*, see Peter H. Russell, “The *Patriation* and *Quebec Veto* References: The Supreme Court Wrestles with the Political Part of the Constitution” (2011) 54 S.C.L.R. (2d) 69. My thanks to an anonymous reviewer for this point.

⁷⁸ See the discussion of the *Harvey*, *supra*, note 1, case in Part III.2.

⁷⁹ *Saskatchewan Reference*, *supra*, note 1.

⁸⁰ *Electoral Boundaries Commission Act*, S.S. 1986-87-88, c. E-6.1.

the electoral districts that were within plus or minus 25 per cent from the provincial quotient.⁸¹ As a result of these restrictions, the electoral map favoured rural voters and under-represented urban voters.⁸²

In a 5-3 decision, McLachlin J. (as she was then, joined by La Forest, Gonthier, Stevenson and Iacobucci JJ.) held on behalf of the majority that the electoral boundaries did not infringe the Charter.⁸³ The majority rejected the idea that electoral districts must adhere to the one-person, one-vote principle. In a key passage, McLachlin J. stated that “the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to “effective representation”.”⁸⁴ The majority also concluded that the disparity between the rural and urban areas did not violate the right to vote.⁸⁵

For the majority, electoral redistricting fell on the “politics” side of the framework/politics divide. The majority issued very broad parameters for electoral redistricting, thereby providing legislatures and redistricting commissions with a great deal of flexibility. In a concurring opinion, Sopinka J. also followed the “politics” approach by arguing that the legislature is free to impose additional rules on the commission because the commission itself was created by the legislature.⁸⁶ The majority also refused to enquire into either the process used by the legislature or its motivations. As commentators have observed, however, the electoral boundaries at issue in *Saskatchewan Reference* involved partisan rule-making.⁸⁷ The redistricting map enhanced the Progressive Conservatives’ electoral support, which in the

⁸¹ *Saskatchewan Reference*, *supra*, note 1, at 167. The provincial quotient is calculated by dividing the total voting population in the province by the number of ridings. The two northern ridings varied within plus or minus 50 per cent of the provincial quotient. *Id.*, at 175, 190.

⁸² *Id.*, at 169.

⁸³ Joining the majority were La Forest, Gonthier, McLachlin, Stevenson and Iacobucci JJ.

⁸⁴ *Saskatchewan Reference*, *supra*, note 1, at 183.

⁸⁵ *Id.*, at 192-95.

⁸⁶ *Id.*, at 199, Sopinka J. concurring.

⁸⁷ Dawood, “Electoral Fairness”, *supra*, note 7, at 537-45; Ronald Fritz, “Challenging Electoral Boundaries Under the *Charter*” (1999-2000) 5 *Rev. Const. Stud.* 1, at 4; Ronald E. Fritz, “The Saskatchewan Electoral Boundaries Case and Its Complications” in John C. Courtney, Peter MacKinnon & David E. Smith, eds., *Drawing Boundaries: Legislatures, Courts and Electoral Values* (Saskatoon: Fifth House Publishers, 1992) 70; Mark Carter, “Ambiguous Constitutional Standards and the Right to Vote” (2011) 5 *J. Pol. Parl. L.* 309, at 320-21; Mark Carter, “Reconsidering the *Charter* and Electoral Boundaries” (1999) 22 *Dal. L.J.* 53, at 58 [hereinafter “Carter, ‘Electoral Boundaries’”]; Christopher D. Brecht & Markus F. Kremer, “Section 3 of the *Charter*: Democratic Rights at the Supreme Court of Canada” (2005) 17 *Nat. J. Const. L.* 19, at 21-27.

late 1980s was located primarily in the rural districts.⁸⁸ The Court majority refused to focus attention on the motivation of the political party in power.⁸⁹ As discussed in more detail in Part III.5 below, the difficulty with the majority's "politics" approach, is that it does not provide sufficient protection against partisan rule-making by elected officials.

By contrast, the dissenting opinion viewed electoral redistricting as raising issues that fell within the "constitutional framework" side of the divide. Justice Cory (joined by Lamer C.J.C., and L'Heureux-Dubé J.) concluded that there had been an infringement of section 3, and furthermore that the government had failed to justify the infringements under section 1. Justice Cory was concerned that the legislature was interfering with the work of the independent commission, and that the right to vote of the urban voters was diluted as a consequence. He alluded to the problem of partisan gerrymandering, noting that the "haunting spectre of 'rotten boroughs' is not that far removed as to be forgotten".⁹⁰ In addition, Cory J. noted that the government provided no explanation as to why the legislature "shackle[d] the Commission with the mandatory rural-urban allocation and the confinement of urban boundaries to municipal limits".⁹¹ Unlike the majority, which provided the legislature with a great deal of latitude to engage in electoral redistricting, the dissent held the legislature to account, arguing that electoral redistricting was subject to constitutional requirements. Justice Cory argued that the "fundamental right to vote should not be diminished without sound justification".⁹² This approach is preferable because it places constitutional limits on the political sphere. As the dissent noted, legislative interference with the right to vote risked "bringing the democratic process itself into disrepute".⁹³

2. The Continuing Debate: *Haig, Harvey and Sauvé II*

The majority and dissenting opinions in *Saskatchewan Reference* provided two different approaches to the judicial supervision of the democratic process. One approach is to treat the electoral process as falling

⁸⁸ David Johnson, "Canadian Electoral Boundaries and the Courts: Practices, Principles and Problems" (1994) 39 McGill L.J. 224, at 228.

⁸⁹ Carter, "Electoral Boundaries", *supra*, note 87, at 58.

⁹⁰ *Saskatchewan Reference*, *supra*, note 1, at 172, Cory J., dissenting.

⁹¹ *Id.*, at 173, Cory J. dissenting.

⁹² *Id.*, at 174, Cory J. dissenting.

⁹³ *Id.*, at 172, Cory J. dissenting.

primarily within the political sphere, and to defer to the legislature. The other approach is to treat the electoral process as falling partially within the constitutional framework, and to hold the legislature to account for its regulation of the democratic system. The *Haig*, *Harvey* and *Sauvé II* decisions likewise raise the politics/framework problem.

At issue in *Haig v. Canada* was whether section 3 guaranteed the right to vote in the national referendum on the Charlottetown Accord.⁹⁴ In all provinces and territories except Quebec, the referendum took place under federal legislation.⁹⁵ In Quebec, the referendum took place under provincial legislation that imposed a six-month residency requirement on all voters.⁹⁶ Graham Haig, who had moved from Ontario to Quebec during the relevant period, was ineligible to vote in Quebec because he did not meet the six-month residency requirement and he was also ineligible to vote in Ontario because he no longer resided in an area covered by the federal legislation.⁹⁷

In *Haig*, the five-member majority treated the referendum as falling within the political domain and not the constitutional one. Writing for the majority, L'Heureux-Dubé J. stated that a "referendum as a platform of expression is ... a matter of legislative policy and not of constitutional law".⁹⁸ As such, a referendum is not subject to section 2(b) or the Charter in general because it is a "creation of legislation".⁹⁹ The majority also concluded that section 3 was clearly limited to the election of representatives to the provincial and federal legislatures, and hence did not guarantee the right to vote in a referendum.¹⁰⁰

In a dissenting opinion, Iacobucci J. (joined by Lamer C.J.C.) argued that Mr. Haig's section 2(b) rights were violated by the effect of the federal *Referendum Act*, and moreover, that the violation could not be saved under section 1.¹⁰¹ Justice Iacobucci argued that the two referenda, taken together, had a "national character" that was intended to involve all Canadians.¹⁰² Although Iacobucci J. agreed with the view that the government is not obligated to hold referenda, nor follow their results, he

⁹⁴ *Haig*, *supra*, note 1, at 1019.

⁹⁵ See *Referendum Act*, S.C. 1992, c. 30.

⁹⁶ See *Referendum Act*, R.S.Q. c. C-64.1.

⁹⁷ *Haig*, *supra*, note 1, at 1009.

⁹⁸ *Id.*, at 1041.

⁹⁹ *Id.*, at 1040.

¹⁰⁰ *Id.*, at 1033.

¹⁰¹ *Id.*, at 1062, Iacobucci J. dissenting.

¹⁰² *Id.*, Iacobucci J. dissenting.

argued that if the government “chooses to conduct a referendum, it must do so in compliance with the Charter”.¹⁰³ Unlike the majority, Iacobucci J. held that legislative creations such as referenda trigger constitutional protections. His approach recognized the dual political-constitutional character of the electoral process.

In its subsequent law of democracy case, *Harvey v. New Brunswick (Attorney General)*, the Court considered whether provisions of the *New Brunswick Elections Act* violated section 3 of the Charter.¹⁰⁴ Mr. Harvey, who was a member of the New Brunswick Legislative Assembly, was convicted for violating the Act for having induced a female under the age of 18 to vote in the election even though he knew she was ineligible to vote.¹⁰⁵ Under the terms of the Act, Mr. Harvey lost his seat and he was also disqualified from running as a candidate for five years.¹⁰⁶ He argued that section 3 provided an unqualified right to run for office, and as such, the provisions of the Act infringed section 3.¹⁰⁷ A six-member majority of the Court, in an opinion written by La Forest J., agreed with the appellant that the provisions of the Act violated section 3.¹⁰⁸ The majority found, however, that the provisions were justifiable under section 1.¹⁰⁹

In dissent, McLachlin J. (as she was then) and L’Heureux-Dubé J. argued that the real issue in the case is “what power the courts have to question a rule of the legislature as to the consequences of electoral corruption”.¹¹⁰ The dissent asserted that the legislature’s internal proceedings were protected by parliamentary privilege, and hence, were not subject to the Charter or to judicial review.¹¹¹ While there is no doubt that corrupt electoral practices must be addressed for the proper functioning of democracy, claimed the dissent, it is the role of the legislature to respond to actions that undermine its integrity.¹¹² For the dissent, the rules regarding electoral cor-

¹⁰³ *Id.*, at 1065.

¹⁰⁴ *Harvey*, *supra*, note 1, at para. 4. The case also considered whether the Act violated s. 12, but this issue lies outside the scope of this paper.

¹⁰⁵ *Id.*, at para. 5.

¹⁰⁶ *Id.*, at para. 6.

¹⁰⁷ *Id.*, at para. 21.

¹⁰⁸ *Id.*, at para. 28. The majority rejected the argument that the provisions of the *New Brunswick Elections Act* amounted to cruel and unusual punishment in violation of s. 12 of the Charter. *Id.*, at para. 33.

¹⁰⁹ *Id.*, at paras. 38-51.

¹¹⁰ *Id.*, at para. 60, McLachlin J. dissenting.

¹¹¹ *Id.*, at paras. 55, 68-69, McLachlin J. dissenting.

¹¹² *Id.*, at para. 56, McLachlin J. dissenting.

ruption fell squarely in the political sphere. The difficulty with this approach, however, is that it does not provide enough protection to the citizens to be free from electoral corruption. The majority's approach is preferable because it subjects the political sphere to constitutional limits but finds that the rights violation is nonetheless justified.

The framework/politics problem was also evident in the Supreme Court's decision in *Sauvé v. Canada (Sauvé II)*.¹¹³ At issue in the case was section 51(e) of the *Canada Elections Act*, which denied the right to vote to prisoners who had sentences of two years or more.¹¹⁴ The Court was closely divided. Writing for a five-member majority, McLachlin C.J.C. (joined by Iacobucci, Binnie, Arbour and LeBel JJ.) struck the provision down as an unjustified violation of section 3.¹¹⁵ The majority asserted that the "right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination."¹¹⁶ According to the majority, judicial deference was not appropriate when fundamental rights were at stake. In an important passage, McLachlin C.J.C. made a distinction between fundamental rights, on the one hand, and social and political policies, on the other:

The core democratic rights of Canadian do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights.¹¹⁷

For the majority, the issue fell within the realm of the constitutional framework since the right to vote was impaired. By contrast, the dissenting justices described the issue as involving "competing social or political philosophies relating to the right to vote".¹¹⁸ Writing for the dissenting justices, Gonthier J. (joined by L'Heureux-Dubé, Major and Bastarache JJ.) argued that the "case rests on philosophical, political and

¹¹³ *Sauvé II*, *supra*, note 1. For analyses of the case, see David M. Brown, "Sauvé and Prisoners' Voting Rights: The Death of the Good Citizen?" (2003) 20 S.C.L.R. (2d) 297; Richard Haigh, "Between Here and There is Better than Anything Over There: The Morass of *Sauvé v. Canada (Chief Electoral Officer)*" (2003) 20 S.C.L.R. (2d) 353.

¹¹⁴ *Canada Elections Act*, R.S.C. 1985, c. E-2, s. 51(e).

¹¹⁵ *Sauvé II*, *supra*, note 1, at para. 62.

¹¹⁶ *Id.*, at para. 9.

¹¹⁷ *Id.*, at para. 13.

¹¹⁸ *Id.*, at para. 67, Gonthier J. dissenting.

social considerations which are not capable of “scientific proof”.¹¹⁹ For this reason, the Court should defer to Parliament’s judgment that temporary disenfranchisement enhances rule of law and democracy.¹²⁰ The dissent’s “politics” approach, however, does not provide sufficient protection to the constitutional dimensions of the right to vote.

3. Debating Deference in *Harper* and *Bryan*

The Court’s more recent cases, *Harper v. Canada* and *R. v. Bryan*, also exhibit the framework/politics problem. Both cases involved provisions of the *Canada Elections Act* that infringed the freedom of expression. At issue in *Harper* was the constitutionality of third party spending limits.¹²¹ Writing for a six-member majority, Bastarache J. held that while the spending limits infringed the freedom of expression guarantee in section 2(b) of the Charter, the provisions were nonetheless justifiable under section 1.¹²² In *Bryan*, a five-member majority upheld the constitutionality of section 329 of the *Canada Elections Act* which prohibited the transmission of election results between electoral ridings before the closing of all polling stations in Canada.¹²³ The claimant had posted election results from Atlantic Canada on a website while polls were still open in other electoral ridings.¹²⁴ The majority held that although the provision infringed the freedom of expression as protected by section 2(b), it could nonetheless be upheld under section 1.

The divide in the Court in the *Harper* and *Bryan* decisions is based in large part on competing views about judicial deference to Parliament’s regulation of the electoral process. I suggest that this debate over deference is rooted in a deeper question about the nature of the electoral process. The Court majority was highly deferential to Parliament because it saw the electoral process as being presumptively “political”. In

¹¹⁹ *Id.*

¹²⁰ *Id.*, at para. 68, Gonthier J. dissenting.

¹²¹ *Canada Elections Act*, S.C. 2000, c. 9. Third party spending refers to campaign spending that is conducted by individuals, groups, corporations or institutions.

¹²² *Harper, supra*, note 1, at paras. 66, 121. Justice Bastarache was joined by Iacobucci, Arbour, LeBel, Deschamps and Fish JJ.

¹²³ *Bryan, supra*, note 1. Justice Bastarache wrote the majority opinion, Fish J. wrote a concurring opinion, and Deschamps, Charron and Rothstein JJ. joined the opinions of both Bastarache J. and Fish J. to form a five-member majority.

¹²⁴ *Id.*

Harper, the majority asserted that the workings of the electoral system are a “political choice” and the specific details of these political choices should be left to Parliament to determine.¹²⁵ Since Parliament has the right to “choose Canada’s electoral model”, it is incumbent on the Court to defer to Parliament.¹²⁶ Similarly in *Bryan*, the majority stated that the Court ought to take a “natural attitude of deference” with respect to election laws.¹²⁷ The majority of the Court viewed election laws as presumptively falling within the political sphere.

In both cases, the majority was highly deferential in its treatment of the social science evidence. In *Harper*, the majority stated that the Court may rely on a “reasoned apprehension of harm” standard when the social science evidence is either inconclusive or conflicting.¹²⁸ Likewise in *Bryan*, the majority was highly deferential in its assessment of the government’s social science evidence.¹²⁹ The majority in each decision was also highly deferential to the government in the section 1 analysis. In *Harper*, the majority found that the government’s objective of electoral fairness was pressing and substantial, and that the legislative provisions satisfied the three stages of the proportionality test.¹³⁰ Likewise in *Bryan*, Bastarache J. found that the government’s objective of ensuring informational equality was pressing and substantial, and that the provision satisfied the proportionality stage of the *Oakes* test.¹³¹

By contrast, the dissenting justices treated the problem before the Court as one that fell within the realm of the constitutional framework. Because a constitutional aspect of the electoral system (the right to freedom of expression) was at issue in the case, there was no presumption of deference to Parliament. For the dissenting justices, Parliament must reach a higher standard of justification for violating the right of freedom of expression even though it is doing so to achieve democratic aims. In their dissenting opinion in *Harper*, McLachlin C.J.C. and Major J. (joined by Binnie J.) found that the spending limits failed the minimal impairment stage of the *Oakes* test because they imposed a “virtual ban” on citizens who wished to participate

¹²⁵ *Harper, supra*, note 1, at para. 87.

¹²⁶ *Id.*

¹²⁷ *Bryan, supra*, note 1, at para. 9.

¹²⁸ *Harper, supra*, note 1, at paras. 77-78.

¹²⁹ *Bryan, supra*, note 1, at paras. 16, 28.

¹³⁰ *Harper, supra*, note 1, at paras. 92, 104, 116, 120-121.

¹³¹ *Bryan, supra*, note 1, at paras. 35, 41-51. See *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

in the political deliberation during the election period.¹³² According to the dissent, the “dangers posited are wholly hypothetical” because there is no evidence that wealthy citizens “are poised to hijack this country’s election process”.¹³³ Similarly in *Bryan*, Abella J. (joined by McLachlin C.J.C., Binnie and LeBel JJ.) argued that the provision did not meet the proportionality test under section 1. The publication ban was an “excessive response to an insufficiently proven harm”.¹³⁴ Justice Abella also argued that the evidence provided by the government was not sufficient to justify infringing the freedom of expression.¹³⁵

In summary, the majority opinions in both cases adopted a presumption of deference with respect to Parliament. This deference was based on a prior determination that the electoral system fell within the political realm. By contrast, the dissenting justices treated the problem before the Court as one that belonged to the realm of the constitutional framework. Because the constitutional aspects of the electoral system (the right to freedom of expression) were at issue in the case, there should be no presumption of deference to Parliament.

4. *Figueroa v. Canada* and the Framework/Politics Problem

In the cases discussed above, the framework/politics problem is a recurring theme, but the Supreme Court did not devote much if any discussion to it. The *Figueroa* decision is significant because a concurring opinion provides a discussion of the framework/politics problem (without using this specific terminology). In *Figueroa*, the head of the Communist Party of Canada challenged the constitutionality of a requirement that political parties nominate candidates in at least 50 electoral districts in order to register as a political party.¹³⁶ Registered political parties are granted a number of benefits under the *Canada Elections Act*.¹³⁷ The Supreme Court held that the 50-candidate rule violated section 3 and was not justifiable under section 1.¹³⁸ Writing for the six-member majority, Iacobucci J. stated that section 3 includes “the right of

¹³² *Harper*, *supra*, note 1, at para. 35, McLachlin C.J.C. and Major J. dissenting.

¹³³ *Id.*, McLachlin C.J.C. and Major J. dissenting.

¹³⁴ *Bryan*, *supra*, note 1, at para. 133, Abella J. dissenting.

¹³⁵ *Id.*, at para. 107, Abella J. dissenting.

¹³⁶ *Figueroa*, *supra*, note 1, at para. 3.

¹³⁷ *Id.*, at para. 4.

¹³⁸ *Id.*, at para. 90.

each citizen to play a meaningful role in the electoral process”.¹³⁹ The majority also found that political parties act “as both a vehicle and outlet” for the participation of citizens in the electoral process.¹⁴⁰

The dual political-constitutional character of the electoral process was discussed by LeBel J. in a concurring opinion. Justice LeBel posited that the “government has fairly wide latitude in choosing how to design the electoral system and how to combine the various competing values at play”.¹⁴¹ The choice among various representative options “should be viewed as a matter of political and philosophical preference in which it is not this Court’s role to intervene”.¹⁴² The role of the Court is to ensure that the legislature stays within “constitutional limits”, and in particular, to make sure that the values of effective representation and meaningful participation are not compromised.¹⁴³

Although the government has latitude to design the electoral system, it infringed section 3 in this particular case because the regulations prevented the participation of citizens and political parties. Justice LeBel argued that parties “enhance representation by making the political participation of individuals more effective than it would be if those individuals acted alone without the coordination, structure and cooperation that the party system provides”.¹⁴⁴ Parties also “keep voters informed of important issues and provide them with meaningful electoral choices”.¹⁴⁵ For LeBel J., the regulation of political parties raises “framework” issues. He stated that parties are “such important actors in our political system that, although they are private and voluntary organizations, they also possess some of the characteristics of a public institution”.¹⁴⁶ The number of candidates a party must field “is part of the framework for the recognition and regulation of political parties”.¹⁴⁷ One way of understanding LeBel J.’s and the majority’s position is that the regulatory framework essentially shut out or disenfranchised smaller

¹³⁹ *Id.*, at para. 25. The majority opinion was authored by Iacobucci J. (and joined by McLachlin C.J.C., Major, Bastarache, Binnie and Arbour JJ.), and the concurrence was written by LeBel J. (joined by Gonthier, Deschamps JJ.).

¹⁴⁰ *Id.*, at para. 39.

¹⁴¹ *Id.*, at para. 158.

¹⁴² *Id.*, at para. 161.

¹⁴³ *Id.*

¹⁴⁴ *Id.*, at para. 140.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*, at para. 143.

¹⁴⁷ *Id.*, at para. 146.

political parties.¹⁴⁸ For this reason, the Court majority was not willing to defer to the legislature. The Court majority's decision in *Sauvé II* is similar: rules that disenfranchise citizens immediately raise serious framework problems that override judicial deference to the political sphere.¹⁴⁹

5. Democratic Legitimacy and Navigating the Duality of the Electoral System

Justice LeBel's approach in the *Figueroa* case provides a helpful guide to navigating the framework/politics problem. Although LeBel J.'s opinion was a concurrence, and hence of limited precedential value, I suggest that it provides a useful analysis of the duality of the electoral system. As a start, LeBel J. acknowledges the dual political-constitutional nature of the electoral process. He noted that the government has "fairly wide latitude" in the task of designing the electoral system and choosing which values are emphasized.¹⁵⁰ The choice among these options is a matter of political and philosophical preference, and as such, the Court should not intervene in the decision to choose one electoral option over another.¹⁵¹ The Court does, however, have a role in ensuring that the legislature does not exceed certain constitutional limits.¹⁵² Although LeBel J. does not provide much detail on what precisely these constitutional limits may be, he states that the Court's role is to ensure that certain values, such as effective representation and meaningful participation, are protected.¹⁵³ In the context of *Figueroa*, LeBel J. found that the government's regulation of political parties violated the section 3 right to vote. The regulation of political parties undoubtedly falls within the realm of the political because it involves the basic design of the electoral process, but it is nonetheless subject to constitutional scrutiny.

Thus, according to LeBel J., the legislature's role is to choose "between the various species of democratic electoral system" while the Court's role is to subject these choices to "certain boundaries, which it is

¹⁴⁸ My thanks to an anonymous reviewer for this observation.

¹⁴⁹ *Sauvé II*, *supra*, note 1.

¹⁵⁰ *Figueroa*, *supra*, note 1, at para. 158.

¹⁵¹ *Id.*, at para. 161.

¹⁵² *Id.*

¹⁵³ *Id.*

the responsibility of the judiciary to delineate”.¹⁵⁴ Justice LeBel’s formulation is helpful because it holds that both the legislature and the courts have a role to play in the regulation of the democratic system. Although Parliament has the power to make choices about the electoral system in the political sphere, these choices are subjected to constitutional limits by the courts. Crucially, it is for the courts to “delineate” the constitutional boundaries of the legislature’s political choices.

Another reason the Court should treat electoral laws with a certain amount of skepticism is that elected officials have a propensity to enact laws that perpetuate their own power. The Canadian law of democracy literature has examined the structural problem of partisan self-dealing in detail.¹⁵⁵ The risk posed by partisan self-dealing cannot be adequately addressed by a Court that is overly deferential to Parliament.¹⁵⁶ As I have argued elsewhere, the Court should not automatically defer to Parliament in its law of democracy cases on the basis that the government has the power to choose the electoral system.¹⁵⁷ The Court’s principal role is to ensure the fairness of the democratic process.¹⁵⁸ To do so, the Court must recognize the duality of the electoral system, and ensure that the political aspect falls within constitutional limits.

The proper characterization of the electoral system as either political or constitutional (or both) is also implicitly connected to the issue of judicial legitimacy. If the electoral process is deemed to be a purely political entity, then judicial oversight is illegitimate because the court is intervening in the political sphere. If, however, the electoral process is viewed as being both political and constitutional, then judicial intervention is legitimate. Thus, perceptions about the appropriate judicial role is affected by a prior position on the nature of the democratic process as either political or constitutional.

In the *Opitz* case, for example, the justices were divided with respect to the Court’s role in adjudicating contested elections. The majority justices favoured an approach that leaves the political system to politics,

¹⁵⁴ *Id.*, at para. 182. At the same time, LeBel J. thought that the majority “risks unduly expanding the scope of judicial review of the design of the electoral system” when it suggested that the “motive behind the legislation may itself be illegitimate”. *Id.*

¹⁵⁵ For a discussion of the structural turn, see Dawood, “Electoral Fairness”, *supra*, note 7, at 503-504, 511-18.

¹⁵⁶ *Id.*, at 556-61.

¹⁵⁷ *Id.*, at 560-61.

¹⁵⁸ *Id.*, at 504.

subject to certain very broad parameters. By adopting the substantive approach, the majority signalled that mistakes in the administrative procedures are not necessarily fatal. The majority's decision also makes it less likely that candidates will challenge election outcomes in court. By choosing a more difficult standard to meet, the Court was insulating the electoral system from judicial review. By contrast, the dissenting justices favoured an approach that holds the government to account for its administration of the electoral process. By taking a more formal approach to the requirements for entitlement to vote, the dissent provided greater opportunities for candidates to challenge the finality and accuracy of election outcomes in court.

The Court's decision in *Libman v. Quebec (Attorney General)*¹⁵⁹ provides another illustration of LeBel J.'s approach. In *Libman*, the Court considered the constitutionality of the third party spending limits set out in Quebec's *Referendum Act*, which laid forth the rules for the referendum on the Charlottetown Accord.¹⁶⁰ The referendum legislation required that regulated expenses be incurred only through a national committee, which meant that individuals who supported neither the "yes" nor the "no" option were limited to unregulated expenses.¹⁶¹ The Court held that the restrictions infringed the freedom of political expression and could not be upheld under section 1 of the Charter.¹⁶² It found that the provisions did not meet the minimal impairment test because the limits imposed on groups that do not affiliate themselves with the national committees are so restrictive that they amount to a total ban.¹⁶³

At the same time, the Court stated that it was important to prevent "the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources".¹⁶⁴ As noted by Colin Feasby, the Court appeared to favour an "egalitarian" approach to the rules governing spending during a referendum or an election.¹⁶⁵ The basic idea is that those with greater wealth should not be permitted to control the electoral process and thereby dis-

¹⁵⁹ *Libman*, *supra*, note 1.

¹⁶⁰ *Id.*, at para. 1.

¹⁶¹ *Id.*, at para. 14.

¹⁶² *Id.*, at paras. 35, 85.

¹⁶³ *Id.*, at para. 82.

¹⁶⁴ *Id.*, at para. 41.

¹⁶⁵ Colin Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model" (1999) 44 McGill L.J. 5, at 8, 31-32.

advantage those with less wealth; that is, disparities in private wealth should not be translated into disparities of political influence. The Court recognized that Parliament has the right to regulate campaign spending and to choose the values underlying election laws, but it also held that the specific spending limits at issue in the case unjustifiably infringed the freedom of expression.

In its recent cases, however, most notably in *Harper* and *Bryan*, the Court majority has deferred to the legislature on the basis that the electoral system is “political” and hence not a subject about which the Court should be overly involved. The difficulty with this approach is that it does not pay sufficient attention to the duality of the electoral process. Although there is an important political aspect to the electoral process, there is an equally important constitutional aspect. As noted by LeBel J., it is the role of the Court to subject the political aspect to constitutional limits. Instead of automatically deferring to the government on the basis that the electoral system is “political”, the Court should instead subject the legislative provision to greater scrutiny.

IV. CONCLUSION

This article has examined the phenomenon of “dissenting about democracy”. Although the Supreme Court’s law of democracy cases involve a wide array of topics, I claim that many of the disputes between the majority and dissenting justices are based upon fundamentally divergent views on the nature of the electoral system itself. The puzzle underlying many cases is whether the electoral system falls within the realm of the constitutional framework or the realm of politics. I have referred to this puzzle as the “framework/politics” problem.

Unless the Court devotes greater consideration to this issue, there is every reason to believe that the framework/politics problem will continue to present challenges in future cases. It is very difficult, if not impossible, to characterize the electoral system as either political or constitutional. The challenge posed by the framework/politics problem is that the electoral system is *both* a constitutional and political entity at any given point. I have argued that the best approach to the framework/politics problem is to recognize the dual political-constitutional character of the electoral process. As LeBel J. argued in *Figueroa*, it is for the legislature to choose among different types of electoral structures, and for

the Court to subject these choices to “certain boundaries, which it is the responsibility of the judiciary to delineate”.¹⁶⁶ In recent cases, however, the majority’s position has been to reflexively defer to Parliament’s electoral rules on the basis that the electoral system is political. The Court should instead recognize the dual constitutional-political nature of the electoral system. In particular, this recognition would mean that the Court would not automatically defer to Parliament.

The framework/politics problem also raises larger questions about democratic legitimacy and the role of the Court. One view is that judicial intervention in the electoral system detracts from democratic legitimacy because the Court is encroaching on the political sphere. Another view is that judicial intervention in the electoral system enhances democratic legitimacy because the electoral process is bound by constitutional rules. I have argued that democratic legitimacy is enhanced when the Court ensures that the electoral process meets constitutional requirements. A posture of automatic deference to Parliament on the basis that the electoral process is “political” diminishes democratic legitimacy because it does not hold elected officials to account for their actions. In sum, the dual constitutional-political nature of the democratic process requires active involvement by both legislatures and courts.

¹⁶⁶ *Figueroa*, *supra*, note 1, at para. 182.

